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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MARK JAMES KNIGHTS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CENTER FOR THE COMMUNITY INTEREST AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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This amicus curiae brief is submitted in support of petitioner, the United States of America. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.[1]

INTEREST OF THE AMICUS

The Center for the Community Interest is a national non-profit public interest organization founded to provide a voice for localities and community groups on public safety and quality-of-life issues. CCI helps cities, states, civic associations, and community groups to develop and defend policies that strike a reasonable balance between the rights of the individual and the needs of the larger community. Through its National Neighborhood Safety Legal Network, CCI has organized and provided legal advice to hundreds of citizens groups across the nation, and has developed a nationally recognized expertise on legal issues affecting the safety and quality of life of communities. CCI has participated in a wide range of public safety and quality-of-life cases before this Court and other courts throughout the country,[2] and has developed model legislation, policies, and Internet resources that assist communities in addressing problems such as illegal gangs, disorder in public spaces,

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[1] This brief was prepared in whole by the counsel listed on the cover. No person or entity, other than the amicus curiae, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Most recently, CCI participated as amicus curiae before this Court in *Dickerson v. United States*, 530 U.S. 428 (2000) (supporting the admissibility of voluntary confessions given in the absence of Miranda warnings); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (defending civil commitment of certain dangerous sexual offenders); *Montana v. Egelhoff*, 518 U.S. 37 (1996) (supporting reasonable restrictions on criminal defenses available to drunk drivers); *Bennis v. Michigan*, 516 U.S. 442 (1996) (defending asset forfeiture programs to control street prostitution).

nuisance properties, open-air drug markets, and adult businesses in residential neighborhoods.

CCI is extremely concerned that the decision of the Ninth Circuit in this case, if ratified by this Court, would dangerously restrict the ability of probation and parole authorities across the country to supervise and monitor convicted criminals effectively and would thus compromise neighborhood safety. Moreover, as advocates for a reasonable and sensitive balance between individual liberties and public safety and strong believers in the goals of rehabilitation, CCI is concerned that the Court's decision will have the untoward effect of limiting the availability of probation and parole for all offenders, including those who could be successfully reintegrated into the community.

SUMMARY OF ARGUMENT

The warrantless, without reasonable suspicion ("suspicionless"), search of Knights' residence by police officers pursuant to a consent condition of his probation did not violate his Fourth Amendment rights. This is a vital issue for probation and parole ("community supervision") programs. Any significant limitation on the ability of such programs to monitor probationers and parolees undermines their effectiveness. The recent trend in state and federal courts, the U.S. Court of Appeals for the Ninth Circuit notwithstanding, has been to find that warrantless, suspicionless searches conducted pursuant to a community supervision policy are constitutionally valid.

The Court has recognized that it is ill-suited to address the complex and urgent problems associated with administration of the penal system. Accordingly, in evaluating prison policies that allegedly infringe the constitutional rights of inmates, the Court has applied the legitimate interests test instead of strict scrutiny. The same deferential standard should also be applied to community supervision policies. Community supervision is a variation

on imprisonment and has become the primary means of punishing and monitoring criminals under sentence. Just as limitations on the constitutional rights of prisoners are justified in prisons by the need to deter crime, rehabilitate prisoners, and maintain institutional security, appropriate limitations are justified in probation and parole systems by the need to deter recidivism, monitor rehabilitation, and maintain community security. A deferential standard of review for determining the constitutionality of official policies is needed in both contexts.

In the United States, 4.4 million people are currently on probation or parole, including many violent offenders. Accordingly, community supervision programs have a substantial, not merely legitimate, interest in closely controlling and monitoring probationers and parolees. Community supervision programs utilizing warrantless, suspicionless searches, notably in the city of Boston, Massachusetts, have been extremely successful in reducing recidivism and deterring crime. As a result, similar programs are being implemented rapidly across the country, and prohibiting them from using warrantless, suspicionless searches would significantly impair the effectiveness of the programs. For these reasons, the Court should reverse the Ninth Circuit and determine that, regardless of the validity of Knights' consent, the search of his residence was within the legitimate interests of the California probation system and did not violate the Fourth Amendment.

ARGUMENT

CCI urges the Court to reverse the decision of the Ninth Circuit and hold that the search of Knights' residence by the Sheriff's Department of Napa County, California was reasonable and did not violate Knights' Fourth Amendment rights. We first discuss the application of the legitimate interests test to prison regulations and policies and then show that the Court should apply the same deference in the parole

or probation context. Application of that test demonstrates that warrantless, suspicionless searches are reasonably related to the legitimate interests of community supervision systems and therefore are reasonable under the Fourth Amendment.

I. THE SUSPICIONLESS SEARCH OF KNIGHTS' RESIDENCE IS VALID UNDER THE FOURTH AMENDMENT BECAUSE IT WAS REASONABLY RELATED TO A LEGITIMATE PAROLE INTEREST.

CCI urges the Court to hold that warrantless, suspicionless searches of probationers and parolees are constitutional.[3] The Court should reach this holding by applying the legitimate interests test currently used to assess prison policies that allegedly infringe the constitutional rights of prisoners. Under this standard of review, community supervision policies and practices are constitutionally valid, and a search is reasonable under the Fourth Amendment, if it is reasonably related to legitimate community supervision interests. Warrantless, suspicionless searches of supervisees more than satisfy the reasonable relationship requirement because strict controls and effective monitoring systems are a crucial part of deterring recidivism and fostering rehabilitation of criminals under sentence, whether the sentence is being served within or outside prison walls.

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[3] For purposes of the issues discussed here, probation and parole systems should be treated similarly. *See United States v. Hill*, 967 F.2d 902, 909 (3d Cir. 1992) ("There is 'no constitutional difference between probation and parole for the purposes of the fourth amendment.'") (quoting *United States v. Harper*, 928 F.2d 894, 896 n.1 (9th Cir. 1991).

A. The Court Should Evaluate Alleged Constitutional Infringements in Probation Programs Under the Same Deferential Standard It Applies to Prison Regulations and Policies.

When addressing constitutional claims in the prison context, the Court has recognized that, unlike the executive and legislative branches, courts are ill-equipped to address the complex problems involved in prison administration. As a result, the Court has applied the legitimate interests test to evaluate allegations that official conduct pursuant to a prison regulation or policy infringed an inmate's constitutional rights. For similar reasons, the Court should afford the same deference in the parole and probation context.

1. Prison Regulations and Policies Are Afforded Considerable Deference Because, Unlike the Legislative and Executive Branches, Courts Are Ill-Equipped to Deal with the Problems Inherent in Penal Administration.

When evaluating the constitutionality of prison regulations and policies, the Court has refused to apply strict scrutiny and instead has adopted a policy of judicial restraint. The Court's approach when an inmate alleges that a prison regulation or policy infringes a constitutional right is to find that the regulation or policy "is valid if it is reasonably related to legitimate penological interests."[4] This deferential standard balances the need to protect the constitutional rights of prisoners with the recognition that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."[5] The "complex and intractable" issues presented by the penal system simply can not be

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[4] *Turner v. Safley*, 482 U.S. 78, 89 (1987).

[5] *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974), *overruled on other grounds, Thornburgh v. Abbott*, 490 U.S. 401 (1989).

effectively addressed by judicial decree.[6] Instead, they "require[] expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."[7]

2. *Probation and Parole are an Integral Part of the Penal System, the Administration of Which, Like Prison Management, Requires Judicial Deference.*

The Court should apply the same legitimate interests test to community supervision programs that it uses to evaluate allegations of constitutional rights violations in the prison context. The Court has always recognized that probation and parole are variations on imprisonment.[8]

> Probation is simply one point (or, more accurately, one set of points) on a continuum of possible

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6 *Turner*, 482 U.S. at 84.

7 *Id.* at 85. As the Court explained in *Turner*, "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decision making process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby 'unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.'" *Id.* at 89 (quoting *Procunier*, 416 U.S. at 407).

8 *See Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) ("Probation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty'") (quoting G. Killinger et al., *Probation and Parole in the Criminal Justice System* 14 (1976)); *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) ("Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals.").

> punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service. A number of different options lie between those extremes, including confinement in a medium or minimum-security facility, work release programs, 'halfway houses,' and probation -- which can itself be more or less confining depending upon the number and severity of restrictions imposed.[9]

The similarity between community supervision and incarceration is reflected in the fact that probationers and parolees have only a conditional liberty interest dependent on observance of special restrictions.[10]

In fact, parole and probation are increasingly replacing the use of prisons as the primary method of punishing and rehabilitating criminals,[11] in large part as a result of decreasing prison space[12] and escalating prison costs.[13] At

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9 *Griffin*, 483 U.S. at 874.

10 *See id.* ("To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'") (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

11 *See* Joan Petersilia, *A Crime Control Rationale for Reinvesting in Community Corrections*, 75 PRISON J. 479, 480-81 (1995); Dale G. Parent et al., National Inst. of Justice, U.S. Dep't of Justice, *Responding to Probation and Parole Violations*, July 1994, at 1.

12 Prison populations have increased dramatically leading to a serious overcrowding problem. *See, e.g.*, Bureau of Justice Statistics, U.S. Dep't of Justice, *Corrections Statistics*, July 23, 2000 (incarceration rate has more than tripled since 1980, with the incarceration population growing an average 5.7% annually between 1990 and midyear 1999); *see also* Kerry L. Pyle, *Prison Employment: A Long-Term Solution to the*

the end of 1999, the entire correctional population in the United States reached 6.3 million people or 3.1% of the entire population. Of these 6.3 million people, over half, 3.7 million individuals, were on probation, and an additional 712,713 were on parole.[14] In addition, roughly 600,000 prisoners are expected to be released from federal and state prisons into parole in 2001.[15]

As probation and parole populations rise, the total number of people formally supervised under community supervision programs is also increasing.[16] The increased reliance on community supervision means that many violent offenders live in our communities. As the Court has recognized, these individuals "are more likely to commit future criminal offenses than are average citizens."[17]

Overcrowding Crisis, 77 B.U. L. REV. 151, 152 (1997) (discussing problem of prison overcrowding).

13 Nationally, the total spent on corrections in fiscal year 1996 reached $24.5 billion, or nearly 80% of all corrections expenditures. State expenditures have risen 85% since 1990, while federal expenditures have grown 160% since 1990. *See* James J. Stephan, *State Prison Expenditures, 1996*, Bureau of Justice Statistics, U.S. Dep't of Justice, August 1999.

14 *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *U.S. Correctional Population Reaches 6.3 Million Men and Women: Represents 3.1 Percent of the Adult U.S. Population*, July 23, 2000.

15 *See* Eric Lichtblau, *Decline in Crime Ending: FBI Says Violence Data Show a Leveling Off in U.S. After Years of Lower Rates*, L.A. TIMES, May 31, 2001, at A1.

16 In addition, in 1999, 71% of the total corrections population was supervised as part of formal probation or parole programs. *See* Bureau of Justice Statistics, *supra* note 14.

17 *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 365 (1998).

Further, the objectives of community supervision are substantially similar to the objectives of prisons. Just as the limitation on the constitutional rights of prisoners is justified in prisons by the need to deter crime, rehabilitate prisoners, and maintain institutional security,[18] appropriate limitations are justified in probation and parole systems by the need to deter recidivism, monitor rehabilitation, and maintain community security.[19] Like the running of a prison, administering a community supervision program is "an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."[20] Accordingly, when a community supervision regulation impinges on the constitutional rights of probationers or parolees, the regulation should be valid if it is reasonably related to legitimate community supervision interests.

3. The Legitimate Interests Test Should Be Applied to Alleged Fourth Amendment Violations of Probationers and Parolees.

As established above, the legitimate interests test should be applied to community supervision regulations impacting the constitutional rights of probationers and parolees, including community supervision regulations related to

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18 *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987).

19 *See Griffin*, 483 U.S. at 875 ("[Probation] restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large."); Mark A.R. Kleinman et al., BOTEC Analysis Corp., Massachusetts Inst. For a New Commonwealth, *Criminal Justice in Massachusetts: Putting Crime Control First*, Oct. 1996, at 20 (goals of probation and parole include deterring recidivism, rehabilitating offender, and protecting community).

20 *Turner v. Safley*, 482 U.S. 78, 84-85 (1987).

searches. In *Griffin v. Wisconsin*, the Court examined a Fourth Amendment claim by a probationer and stated that a "[s]tate's operation of a probation system, like its operation of a school, government office or prison," likewise presents "'special needs' beyond normal law enforcement" that justifies departure from the usual warrant and probable cause requirements.[21] While the Court has "not hesitated to balance the government and privacy interests to assess the practicality of the warrant and probable cause requirements,"[22] the balancing test is not the exclusive means by which Fourth Amendment questions may be resolved in a "special needs" situation. As required by the Court's holding in *Turner*, courts have applied the legitimate interests test to all prisoners' constitutional claims, including Fourth Amendment claims.[23] Moreover, in *Griffin*, the Court alluded to the possibility of applying the legitimate interests test in the probation context, but did not decide the question.[24] The Court should now take the next step and

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21 *Griffin*, 483 U.S. at 873-74.

22 *Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602, 619-20 (1989). The Court has used this balancing test, in upholding mandated drug testing of railway employees (*see id.* at 619-33), random drug testing of student athletes (*see Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653-66 (1995)), drug testing of customs agents (*see National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 664-66 (1989)), warrantless inspections of highly regulated businesses (*see New York v. Burger*, 482 U.S. 691, 699-703 (1987)), work-related searches of employees' desks and offices (*see O'Connor v. Ortega*, 480 U.S. 709, 721-25 (1987)), searches of students conducted by public school officials (*see New Jersey v. T.L.O.*, 469 U.S. 325, 337-42 (1985)), and body-cavity searches of inmates (*see Bell v. Wolfish*, 441 U.S. 520, 560 (1979)) as reasonable searches under the Fourth Amendment.

23 *See Thompson v. Souza*, 111 F.3d 694, 699 (9th Cir. 1997); *Covino v. Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992); *Williams v. Price*, 25 F. Supp. 2d 605, 609 (W.D. Pa. 1997).

24 *See* 483 U.S. at 874 n.2.

hold that the legitimate interests test is the appropriate standard by which to evaluate Knights' Fourth Amendment claim.

B. The Legitimate Interests of Supervision of Parolees Require Intensive Monitoring, Including Policies of Conducting Warrantless, Suspicionless Searches of Supervisees.

In this part of the brief, we discuss the four-factor approach the Court has developed to apply the legitimate interests test to official prison conduct and the ways to adapt that approach to probation and parole cases. We then apply the factors to warrantless, suspicionless searches to show that such searches are reasonably related to the legitimate interests of probation or parole. This analysis does not depend on whether a probationer or parolee properly consented to the search as a condition of probation or parole. In the probation and parole context, the only question under the legitimate interests test is whether the policy permitting warrantless, suspicionless searches is valid, regardless of whether the policy includes obtaining the consent of the supervisee.

1. The Court Should Adapt the Factors Used in Applying the Legitimate Interests Test in Prison Cases to Community Supervision Cases.

The factors used to apply the legitimate interests test to prison regulations and policies should be used to evaluate constitutional challenges to official conduct in parole and probation cases. The *Turner* court set out four factors to use in evaluating whether a challenged regulation or policy is "reasonably related" to legitimate interests: first, whether a rational connection exists between the regulation or policy and the legitimate governmental interest invoked as a justification for the action; second, whether alternative means of exercising the right allegedly being infringed remain open

for the inmate; third, whether accommodation of the right allegedly being infringed will have an adverse impact on guards, other inmates, and prison resources; and finally, whether obvious, easy alternatives to the regulation or policy exist.[25]

Although the factors are specific to "prisoner rights" litigation,[26] they provide substantial guidance on how to establish the "reasonably related" connection in community supervision litigation. In *Thompson v. Souza*, a case examining alleged Fourth Amendment violations in the prison context, the Ninth Circuit found *Turner's* four factors "instructive" despite the fact that "[n]ot all four factors will be relevant" for every constitutional claim.[27]

Although prisons and community supervision systems have similar legitimate interests and courts should apply similar factors in evaluating whether a regulation or policy is reasonably related to those legitimate interests, this does not mean that a court would necessarily reach the same conclusion concerning the validity of a regulation or policy affecting prisoners and community supervisees. For example, in *O'Lone v. Estate of Shabazz*, this Court held that a prison policy affecting the ability of Muslim inmates to attend religious services was reasonably related to legitimate penological interests.[28] It is less likely that a policy decision having a similar effect on a group of probationers or parolees would satisfy the "reasonably related" factors. The factors need to be applied on a case-by-case basis with the relevant

25 *See Turner*, 482 U.S. at 89-90.

26 *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989).

27 111 F.3d at 699 (quoting *Michenfelder v. Sumner*, 860 F.2d 328, 331 n.1 (9th Cir. 1988)).

28 *See* 482 U.S. 342, 353 (1987).

differences between prisons and community supervision systems taken into account.

2. *Consideration of the Requisite Factors Demonstrates That a Policy Decision to Conduct Warrantless, Suspicionless Searches is Reasonably Related to the Legitimate Interests of Community Supervision.*

A policy decision to conduct warrantless, suspicionless searches, when examined using the four factors articulated in *Turner*, is reasonably related to the legitimate interests of community supervision. Probation and parole are a common alternative to incarceration in the United States. As probation and parole sentences increasingly incorporate some aspect of community supervision, the ability to conduct warrantless, suspicionless searches is not only rationally related to the interests of probation and parole systems, but is crucial to the basic execution of these sentences.

Intensive supervision programs date to the early 1980s, when the state of Georgia developed the first program that utilized teams of probation officers to closely monitor small numbers of probationers.[29] Since 1985, virtually every state has developed some sort of intensive supervision program.[30] In the twenty years since these programs were introduced, studies have shown that the most successful programs are those that thoroughly and actively monitor every aspect of the subject's daily life. Effective supervision typically includes monitoring the probationer or parolee through unannounced home and work visits.[31] "By combining police

29 *See* Joan Petersilia, *A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?*, FED. PROBATION, Dec. 1989, at 3.

30 *See id.* at 5.

31 *See id.* at 9.

and probation resources, probation supervision has become a 24-hour-a-day, highly accountable reality."[32]

The model city for modern intensive supervision programs is Boston, Massachusetts. Between 1990 and 1995, twenty-five percent of gun and knife homicides in Boston were committed by individuals on probation at the time of these offenses.[33] This statistic, and the rising number of juveniles killed in Boston, prompted the city to create two intensive supervision programs.

Boston's Operation Ceasefire and Operation Night Light were started in 1996. The Ceasefire program implemented strict supervision of parole, probation, and bail conditions including frequent home visits and random stops.[34] The Night Light program is similar but focuses on high-risk youth offenders and organizes supervision teams who visit homes of high-risk probationers and parolees up to four nights a week to ensure they are complying with their probation or parole terms.[35] As a result of these programs, the number of homicides in Boston dropped from 152 in 1990 to *31* in 1999.[36] In fact, Boston went *two and a half years* without a

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32 *Id.* at 8.

33 *See* Candace Zierdt, *The Little Engine that Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 U.S.F.L. REV. 401, 430 (1999).

34 *See* David M. Kennedy, *Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 VAL. U. L. REV. 449, 462-63 (1997).

35 *See* James T. Jordan, *Boston's Operation Night Light: New Roles, New Rules*, The FBI Law Enforcement Bulletin, Aug. 1, 1998, at 1 ("FBI Law Enforcement Bulletin").

36 *See* Editorial, *Law Enforcement Losses*, BOSTON GLOBE, May 3, 2001, at A14.

single youth gun homicide.[37] . A 1997 Boston police department study showed that more than fifty percent of the city's probationers were in compliance with their probation terms, up from an average of seventeen percent in the early 1990s, before the Ceasefire and Night Light programs were instituted.[38]

The "Boston Plan," as it has come to be known, has been heralded by both President Clinton and President Bush as a model for probationer and parolee re-entry into society.[39] It has been studied and copied extensively throughout the country.[40] Over 560 law enforcement and municipal agencies have requested information from the Night Light program and representatives from over 140 law enforcement

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37 *See* Elizabeth Mehren, *National Perspective Crime: Boston's Youth Violence Program Becomes Model for Nation, Collaborative Effort Between Community and Police Credited with Reducing Homicides*, L.A. TIMES, Aug. 24, 1998, at A5.

38 *See* FBI Law Enforcement Bulletin, at 1.

39 President Clinton copied measures from Boston's Ceasefire and Night Light programs in his July 1998 Anti-Gang and Youth Violence Strategy, in a 1999 memorandum calling for the development of a youth violence prevention strategy, and in the largest national firearms enforcement initiative in American history, unveiled in January 2000. In May 2001, President Bush based his gun violence reduction plan, Operation Safe Neighborhoods, on Boston's Operation Ceasefire. *See White House Fact Sheet on Anti-Gang, Youth Violence Strategy*, U.S. NEWSWIRE, July 22, 1998; *President's Memorandum on Deterring and Reducing Gun Crime*, 35 WEEKLY COMP. PRES. DOC. 12, Mar. 20, 1999; *President Clinton Unveils Largest Ever National Gun Enforcement Initiative, Hails New Prosecution Data*, M2 PRESSWIRE, Jan. 19, 2000; *U-Pennsylvania: Bush Targets Gun Violence During Philadelphia Speech*, U-WIRE, May 18, 2001.

40 *See* List of Programs Inspired by the Boston Plan, attached at Appendix A.

and other public agencies have come to Boston to study the program first hand.[41]

Intensive supervision through unannounced visits is the building block of the "Boston Plan" programs started in numerous cities across the country.[42] As in Boston, these programs use frequent home visits and random stops to

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41 *See* FBI Law Enforcement Bulletin, at 1. In May 2001, PolicyLink, a California think tank, issued a 180-page report in which it advocated community-based policing, such as that used in Boston, as a national strategy for handling youth violence. *See* John Ellement, *Think Tank Praises Boston Police*, BOSTON GLOBE, May 17, 2001, at B5.

42 Programs utilizing searches of offenders' homes and workplaces have been started in Nebraska (Omaha Operation Ceasefire, Operation Night Light, and Project Impact), Texas (Spotlight Project), Virginia (Arlington Police and Probation Co-operation program), Tennessee (Memphis Operation Night Light), New Mexico (Albuquerque Operation Night Light), Maryland (Baltimore Operation Safe Neighborhoods), North Carolina (Greensboro and High Point Violent Crime Task Force), Missouri (Kansas City Operation Night Light), Florida (Tampa Operation Night Light), Wisconsin (Milwaukee Operation Ceasefire). *See* Tanya Eiserer, *Project Directed at Youths: Omaha Copies Boston Effort in Hopes of Reducing Gun Violence Among the Young*, OMAHA WOLRD-HERALD, Dec. 19, 1999, at B1; Donald G. Evans, *Project Spotlight -- Partnership in Supervision*, CORRECTIONS TODAY, Vol. 63, Feb. 1, 2001; Patricia Davis, *Police and Probation Officers Team Up to Keep Track*, WASHINGTON POST, Mar. 30, 2000, at V01; John Semien, *Probation Compliance Project Targets Youths*, COMMERCIAL APPEAL, Feb. 27, 1999, at B1; Paul Logan, *Boston Minister to Describe Crime-Fighting Ideas*, ALBUQUERQUE JOURNAL, Oct. 28, 1999, at B1; Peter Hermann, *Police Plan Clampdown on Baltimore Youth Gangs; No-Nonsense Initiative to Use Talk, Big Stick*, BALTIMORE SUN, Jan. 23, 1998, at A1; Amy Wolfford, *Police Turn Up the Heat on Streets: The Violent Crime Task Force Sweeps East Greensboro Neighborhoods To Make Arrests and Ask Residents for their Help*, GREENSBORO NEWS & RECORD, May 5, 2000, at B1; Christine Vendel & Anne Lamoy, *Murder Rate Falls in Both Kansas Citys*, Kansas City Star, Jan. 3, 2000, at B1; Angela Moore, *Firehouse Cops Focus on Repeat Offenders*, ST. PETERSBURG TIMES, June 16, 1998, at B3; James H. Burnett, *Ceasefire Celebrates First-Year Successes*, MILWAUKEE JOURNAL SENTINEL, Jan. 26, 2001, at B5.

ensure that an offender's terms of release into the community are being followed. These programs are also copying Boston's success. Various intensive supervision programs in Kansas City, including an Operation Night Light, are credited with a twenty-four percent drop in the murder rate and the lowest number of homicides, 47, in that city in a decade.[43] In many cases, these programs have obtained immediate positive results -- Milwaukee's implementation of Operation Ceasefire caused a drop in the city's homicide rates after only a year of operation.[44] Warrantless, suspicionless home searches are not only rationally related to the legitimate interests of these community supervision programs, they are a fundamental component of many successful programs.

Addressing *Turner's* second factor, there are no easy alternatives to a warrantless, suspicionless search for determining many types of violations of supervision conditions. As the Colorado Supreme Court recognized in upholding warrantless, suspicionless searches of probationers' or parolees' homes:

> The ability to conduct surprise searches . . . even without specific reason to believe that the parolee [or probationer] has committed a violation, serves as a powerful deterrent to parole violations and as an invaluable aid in the [ ] officer's efforts to assist in the [supervisee's] rehabilitation.[45]

Numerous other courts have agreed with this assessment.[46] As the New Hampshire Supreme Court has stated, "simply

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43 *See* Vendel & Lamoy, *supra* note 42, at B1.

44 *See* Burnett, *supra* note 42, at B5.

45 *People v. McCullough*, 6 P.3d 774, 780 (Colo. 2000) (*en banc*).

46 *See People v. Reyes*, 968 P.2d 445, 450-51 (Cal. 1998) (random searches effectively enable probation system to monitor and deter crime); *State v. Zeta Chi Fraternity*, 696 A.2d 530, 541 (N.H. 1997)

monitoring the probationer's progress from a distance" may result in the probationer or parolee "successfully conceal[ing] evidence of ongoing criminality or violations of probation conditions so that the probation officer has no suspicion of misconduct."[47]

Courts have allowed warrantless, suspicionless searches because they understood that community supervision programs must be given the necessary resources to carry out their monitoring responsibilities.[48] The most successful tool utilized by community supervision programs is the warrantless, suspicionless search. As discussed above, the effectiveness of programs utilizing these searches is unquestionable. Under Texas' Project Spotlight, home searches uncovered 87 weapons in a single county.[49] The High Point, North Carolina Violent Crime Task Force credits home visits to high-risk offenders for the city's drop in homicides from 16 in 1997 to 5 in 1999.[50] Simply put, there is no way to replace this "invaluable aid" to community supervision.

(unannounced searches effective in deterring crime); *State v. Smith*, 589 N.W.2d 546, 549 (N.D. 1999) (goals of probation system "justify departure from the usual warrant and probable cause requirements" for home search); *State v. Davis*, 577 N.W.2d 763, 800 (Neb. Ct. App. 1998) (parole system's ability to make unannounced searches allows effective monitoring of parolees); *People v. Eiland*, 576 N.E.2d 1185, 1190 (Ill. App. Ct. 1991) (probation system "must" be allowed to intervene with "lesser degree of certainty than the fourth amendment would otherwise require" in order to properly monitor probationers); *Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir. 1975) (*en banc*) ("impossible" to determine a parolee's conduct without conducting home searches).

47 *Zeta Chi*, 696 A.2d at 539.

48 *See* cases *supra* n.46.

49 *See* Evans, *supra* n.42.

50 *See* Wolfford, *supra* n.42, at B1.

With respect to the third factor articulated in *Turner*, not allowing warrantless, suspicionless searches will have an adverse impact on parole and probation systems around the country. The National Institute of Justice of the United States Department of Justice recently published a landmark study of crime prevention initiatives in the United States which found that "opportunity reduction" measures, including increased police presence and monitoring and intensive supervision, were common aspects of successful crime prevention programs. The study found that "[w]hile most [intensive supervision] efforts are far from the headlines and newscasts, they appear to be quietly transforming America into an effective, efficient crime preventing and controlling society. It is these crimes prevented that are reflected in statistics as non-events – thus lowering overall crime rates."[51] Warrantless, suspicionless searches are a fundamental part of community supervision programs.[52] A limitation or the ability of community supervision programs to engage in intensive supervision would threaten the tremendous crime prevention gains they have made.

The final *Turner* factor, whether alternative means for exercising the right remain open to the community supervisee, is difficult to apply in the Fourth Amendment context because the constitutional right provides that a person cannot be searched in certain circumstances. This means that it is unlikely that a person does not have an alternative method of exercising a Fourth Amendment right when officials need to conduct a search in a particular manner.[53]

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51 Gene Stephens, *Proactive Policing: The Key to Successful Crime Prevention and Control*, USA TODAY, May 1, 2001.

52 *See* pp. 17-18, *supra*.

53 *See Thompson*, 111 F.3d at 699 ("[T]he second Turner factor -- availability of other avenues for exercising the right infringed upon -- is much more meaningful in the [F]irst [A]mendment context than the

Nonetheless, as long as a warrantless, suspicionless search is pursuant to and part of a valid community supervision system, overall consideration of the four factors indicates that the search is reasonably related to legitimate parole interests.[54]

C. The Warrantless, Suspicionless Search of Knights' Residence Satisfies the Legitimate Interests Test.

We now apply the legitimate interests test described above to the search of Knights' residence to demonstrate that the search did not violate his Fourth Amendment rights. The search of Knights' residence by the Napa County Sheriff's Department was pursuant to a policy of the California probation system, as established by the California legislature. The California legislature authorized both the inclusion of the search consent as a condition of the terms of Knights' probation and, by implication, the warrantless, suspicionless search of Knights' residence.[55] Pursuant to this authority,

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[F]ourth or [E]ighth, where the right is to be free from a particular wrong.") (quoting *Michenfelder v. Sumner*, 860 F.2d 328, 331 n.1 (9th Cir. 1988)).

[54] Not every type of search conducted pursuant to a community supervision policy will meet the legitimate interests test. Courts have cautioned that "arbitrary, capricious, or harassing" searches may be unreasonable, and will infringe even on the "greatly reduced" privacy interest of a probationer or parolee. *See People v. McCullough*, 6 P.3d 774, 782 (Colo. 2000) (*en banc*); *People v. Reyes*, 968 P.2d 445, 451 (1998). *See also Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (probationers have lesser expectation of privacy than the public at large). Modern community supervision programs, however, usually have the flexibility needed to avoid such searches.

[55] The applicable California statute states that the sentencing court may impose "reasonable conditions" to facilitate the "reformation and rehabilitation of the probationer." Cal. Penal Code § 1203.1(j) (West 2001).

Knights was required to consent to warrantless, suspicionless searches as a condition of his probation.

The decision to create a probation condition allowing for warrantless, suspicionless searches is exactly the type of policy decision that should be entitled to deference under the legitimate interests test. As explained in Section I(B), a warrantless, suspicionless search of a probationer or parolee conducted pursuant to a probationary policy or regulation is reasonably related to the legitimate interests of a probationary system. There is nothing in the record to indicate that the search of Knights' residence, which was conducted pursuant to an active police investigation, was arbitrary, capricious, or harassing. Accordingly, the search of Knights' residence satisfied these requirements, was reasonable, and did not violate the Fourth Amendment.

II. EVEN IF THE COURT DOES NOT ADOPT THE LEGITIMATE INTERESTS TEST, THE SEARCH OF KNIGHTS' RESIDENCE WAS REASONABLE UNDER THE FOURTH AMENDMENT.

Even if the Court declines to adopt the legitimate interests test, it still should find that the search of Knights' residence pursuant to his search consent was constitutional under *Griffin*'s balancing test. For the reasons discussed in Section I of this brief, the state's need for effective methods to solve the problems of community supervision far outweighs the limited expectation of privacy held by probationers and parolees. Consent searches without reasonable suspicion satisfy the reasonableness requirement of the Fourth Amendment in the context of community supervision, even if the legitimate interests test is not applied in this case. We defer to the fuller discussion of this argument and related points in the brief of the United States.

CONCLUSION

For the foregoing reasons, the Court should decide that the search of Knights' residence did not violate his Fourth Amendment rights. It therefore should reverse the decision of the Ninth Circuit.

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APPENDIX

APPENDIX A

PARTIAL LIST OF PROGRAMS INSPIRED BY THE BOSTON PLAN

1. **Omaha, Ne. Operation Ceasefire**
   Started in August 1999, the program utilizes teams of probation, police and parole officers to closely monitor high-crime neighborhoods and the hangouts of suspects in order to combat gun violence. The teams both conduct searches and execute warrants.[1]

2. **Omaha, Ne. Operation Night Light**
   Teams of two police officers and a probation or police officer visit the homes of violent and at-risk offenders to ensure they are following the terms of their parole or probation. The teams have the right to conduct warrantless searches if such searches are a part of the terms of the youth's probation. If a violation is found, a number of sanctions are used, ranging from stricter curfews and increased drug testing to a revocation of parole or probation.[2]

3. **Omaha, Ne. Project Impact**
   Under Project Impact, which was launched in December 1999, police and probation officers make unannounced visits to the homes of youths on probation or parole, closely monitor gang members, and join with community groups to offer educational and employment

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1 Tanya Eiserer, Project Directed at Youths: Omaha Copies Boston Effort in Hopes of Reducing Gun Violence among the Young, OMAHA WORLD-HERALD, Dec. 19, 1999, at B1.

2 *Id.*

alternatives to youths.[3] A series of drive-by shootings in May 2000 led to increased neighborhood sweeps and police presence, and the formation of a South Omaha Project Impact Team.[4]

4. **Texas Project Spotlight**
Instituted in seven counties, the Project embraces supervising probationers in the community and enforcing probation conditions through partnerships between police and community agencies. Teams of three individuals from various public agencies provide intense supervision through day, evening and weekend visits to probationers' homes, schools, and places of employment. Educational and employment services are also provided.[5]

5. **Providence, R.I. Safe Streets**
Modeled after Operation Night Light, Safe Streets represents Providence's attempt to implement a five-year plan to overhaul its probation system. Since 1995, repeat offenders have committed more than 1,400 crimes in Rhode Island, and almost half of the people on probation, approximately 11,000 offenders, do not have even cursory checks with a probation officer as a term of their probation. There is little to no supervision of probationers to ensure that they are attending mandated counseling sessions and meetings with probation counselors, or to follow up if probationers do fail to appear. Safe Streets involves probation counselors

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3 *Id.*

4 Tanya Eiserer, *Beefed-Up Patrols Target Recent Violence*, OMAHA WORLD-HERALD, May 6, 2000, at 17.

5 Donald G. Evans, *Project Spotlight – Partnership in Supervision*, CORRECTIONS TODAY, Vol. 63, Feb. 1, 2001.

riding with police officers to more closely monitor high-risk offenders at their homes and hangouts. [6]

6. **Arlington, Va. Police and Probation Co-operation**
In March 1998, Arlington County's police department and probation office partnered to more closely supervise probationers by visiting their homes and job sites. Of the 42 probation offices in Virginia, 22 have started some form of community-oriented probation and parole services, each tailored to the specific needs of the community but intended to provide a bridge between the police and probation offices for better monitoring of parolees and probationers.[7]

7. **Memphis, Tn. Operation Night Light**
Created in 1999 by the state Department of Probation, the Shelby County Sheriff's Office and the Memphis Police Department, the program matches two-person teams of probation and police officers who make nightly visits to up to 15 probationers suspected of non-compliance with the terms of their probation.[8]

8. **Albuquerque, N.M. Operation Night Light**
Started in 1999 by the city's Metropolitan Criminal Justice Coordinating Council, this program pairs sheriff's deputies with juvenile probation officers in order to surveille juvenile offenders who are under

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6 Gerald M. Carbone & David Herzog, *Overwhelmed: Many Criminals Go Unsupervised as Caseloads Crush Probation System*, PROVIDENCE JOURNAL, Mar. 4, 2001, at A1.

7 Patricia Davis, *Police and Probation Officers Team Up to Keep Track*, WASHINGTON POST, Mar. 30, 2000, at V01.

8 John Semien, *Probation Compliance Project Targets Youths*, COMMERCIAL APPEAL, Feb. 27, 1999, at B1.

curfew or on probation in order to keep them from "falling through the system's cracks."[9]

9. Baltimore, Md. Operation Safe Neighborhoods

Federal, state, and community agencies review case files and target repeat offenders who will be closely monitored for any violation of their parole or probation. Officials also meet with the parolees and probationers to inform them that any violations of their parole or probation, even minor, will result in long prison sentences and to inform them of counseling options.[10] Police target groups suspected of violence for special attention, ranging from daily visits to sustained misdemeanor arrests. Officials use a close relationship between police and prison officials to seek out juvenile offenders to monitor juvenile offenders in their homes, at their schools, and at hang-outs in order to ensure that they are complying with the terms of their parole or probation.[11]

10. Greensboro, N.C. Violent Crime Task Force

Created in 1999, the task force seeks to combine prevention, enforcement, and community services in a way that will reduce crime rates. In May 2000, the task force executed its first neighborhood sweep. For two days local, federal, and state probation and police officers joined forces to patrol neighborhoods, visiting

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9 Paul Logan, *Boston Minister to Describe Crime-Fighting Ideas*, ALBUQUERQUE JOURNAL, Oct. 28, 1999, at B1.

10 Sheila Hotchkin, *Officials: Violence Will not be Tolerated in Park Heights*, ASSOCIATED PRESS NEWSWIRES, Apr. 25, 2000.

11 Peter Hermann, Police Plan Clampdown on Baltimore Youth Gangs; No-Nonsense Initiative to Use Talk, Big Stick, BALTIMORE SUN, Jan. 23, 1998, at A1.

high-risk offenders, making arrests, and asking residents for their help in monitoring probationers and parolees in the future.[12]

11. High Point, N.C. Violent Crime Task Force

Started by Police Chief Louis Quijas, the task force is similar to the Greensboro task force. Since it's inception, homicides in High Point have dropped from 16 in 1997 to 14 in 1998 to 5 in 1999.[13]

12. Brooklyn, N.Y. Adoption of the "Boston Plan"

In October 1999, after six years of a reduction in crime, crime rates rose in Brooklyn and prompted city, state, and federal crime-fighting authorities to implement many of the measures used to fight crime in Boston. These included more systematic coordination among police, probation officers and community groups to monitor gang members, parolees, and probationers. Officials also meet with gang members to inform them that increased monitoring will occur and to present alternatives to violence. Those who do not attend meetings are considered to be in violation of their parole or probation.[14]

13. Kansas City, Mo. Operation Night Light

Between 1998 and 1999, Kansas City's murder rate dropped 24% and the number of homicides, 47, was the

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12 Amy Wolfford, Police Turn Up the Heat on Streets The Violent Crime Task Force Sweeps East Greensboro Neighborhoods To Make Arrests and Ask Residents for their Help, GREENSBORO NEWS & RECORD, May 5, 1000, at A1.

13 *Id.*

14 Fred Kaplan, *Brooklyn Adopts 'Boston Plan' on Slayings*, BOSTON GLOBE, Oct. 14, 1999, at A14.

lowest in a decade. The implementation of various intensive supervision programs, including Operation Night Light, is credited with the drop in homicides. Teams of police and probation officers focus their monitoring efforts on first-time young offenders in the hopes of preventing repeat offenses.[15]

14. Tampa, Fl. Operation Night Light

Tampa's plan meshes police officers, probation officers, and neighborhood watch programs in order to surveille repeat offenders. The program expands an earlier program in which a police officer was placed in each neighborhood fire station in the city. These officers identify repeat and high-risk offenders in the community, then meet with neighborhood watch programs to share photos, case histories, and addresses of known felons. A bulletin board in each neighborhood fire station also lists information on high-risk offenders recently released into each neighborhood.[16]

15. Allentown, Pa. Ride Along Program

Started in March 2000, at least one weekend night a month probation officers accompany police as they patrol bars and other hangouts looking for individuals violating their parole or probation. The program was started because of persistent violence and homicides outside Allentown bars; in each homicide that occurred outside a bar in Allentown since 1995 either the victim or assailant was on parole. In its first year, the program was responsible for the arrests of 45 probation or parole violators and resulted in no shootings or homicides

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15 Christine Vendel & Anne Lamoy, *Murder Rate Falls in Both Kansas Citys*, KANSAS CITY STAR, Jan. 3, 2000, B1.

16 Angela Moore, *Firehouse Cops Focus on Repeat Offenders*, ST. PETERSBURG TIMES, June 16, 1998, at B3.

outside Allentown bars. While most Pennsylvania counties do not allow probation officers to ride with police, plans have begun to imitate the program in some counties.[17]

16. Milwaukee, Wi. Operation Ceasefire

Milwaukee's Operation Ceasefire was started in January 2000, with its roots directly in the Boston and Richmond programs. In April 2000, Milwaukee police and various clergymen met and decided to send representatives to Boston to study all aspects of that city's plan.[18] Milwaukee's plan involves a joint federal-state-local task force, which pursues and prosecutes illegal gun use and possession. In its first year, Operation Ceasefire led to the prosecution of 684 people, homicide dropped two percent, and homicides with a gun dropped nine percent.[19]

17. Milwaukee, Wi. Community Safety Coalition

The Coalition is part of Milwaukee's Operation Ceasefire program. The Coalition organizes meetings in which prominent law enforcement and other city officials to confront high-risk parolees and probationers

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17 Keith Herbert, The Fast Round-Up: Police and County Officers Swoop into Allentown Bars on Weekend Nights Looking for Probation Violators. It Takes Only Minutes to Get their Man, ALLENTOWN MORNING CALL, Mar. 11, 2001, at A1.

18 James H. Burnett, *Police-Clergy Partnership Finding Other Anti-Crime Collaborators*, MILWAUKEE JOURNAL SENTINEL, Apr. 15, 2000, at B5.

19 James H. Burnett, *Ceasefire Celebrates First-Year Successes*, MILWAUKEE JOURNAL SENTINEL, Jan. 26, 2001, at B5.

with their behavior and assist them with job placement, educational options, and drug counseling.[20]

18. Chicago, Il. Project for Violence Prevention

The Project was created by Gary Slutkin, a public-health professor at the University of Illinois. By September 2000, more than 125 religious leaders had joined the Project in an attempt to counsel youth and work with police to monitor chronic troublemakers in their neighborhoods.[21]

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[20] Jessica McBride, *Telling it Straight*, MILWAUKEE JOURNAL SENTINEL, Mar. 22, 2001, at B1.

[21] Mary Cagney, *Pastors Work with Police to End Gun Violence*, CHRISTIANITY TODAY, Sept. 4, 2000, at 34.